490 U.S. 332, 350-51 (1989). Indeed, as noted in *FEC v. Akins*, 525 U.S. 11, 25 (1998), the possibility that compliance with procedures may not yield concrete benefits in the end – present in many suits for review of administrative action (or inaction) – does not defeat plaintiffs' standing to enforce the procedures.

d. Nor is there the least merit in Respondents' alternative suggestion (Opp. 14-15) that federal jurisdiction was defeated by the possibility that the State of New York might not agree to implement the "shore protection plan" mandated by Section 342 (a suggestion that again requires them to construe the factual allegations *against* plaintiffs at the pleading stage). Petitioners sought an order requiring the federal agencies to adhere to *their* specific statutory duties under Section 342 (which nowhere mentions the State), duties Congress obviously believed would improve real-world conditions on Fire Island.

An order requiring the agencies to comply would have ensured that a plan was in place. While that plan would not be self-executing, its adoption (after years of delays) would have cleared the single greatest obstacle (federal agency delay and indecision) to addressing the erosion problem. Potential future difficulties with the "implementation" of the plan (Opp. 14) do not defeat Petitioners' standing to enforce the Congress's mandate that the plan be "adopt[ed]."[4]

---

[4] Although Congress plainly was aware of the State's role in ultimate implementation, Section 342 nowhere suggests that the agencies could or should await State assent before adopting the expedited plan therein mandated – let alone that "failure" to obtain advance sign-off from New York would be a legitimate basis for ignoring the statutory command.

Respondents' argument heralds a bureaucratic revival of Alphonse and Gaston. In the district court, the State repeatedly protested that "[t]he FIIP is a Corps project" and that the State's obligations under various statutes had "not yet been triggered" because the federal government had not completed any plan. State Defendants' Mem. In Support of Mtn to Dismiss at 5, 6, 7 (Dec. 14, 2001) (E.D.N.Y No. 01-cv-2777). See *New York v. United States*, 505 U.S. 144, 168 (1992) (discussing the interest in preserving the "accountability of both federal and state officials").

2. As demonstrated in the Petition (pp. 26-30), the Second Circuit's dismissal of Petitioners' takings claim was erroneous, and reflective of continuing uncertainty in the lower courts (and this Court's decisions) concerning when the district courts may entertain claims arising under the Takings Clause.

a. Respondents' first submission (Opp. 16) with respect to Petitioners' takings claim, that it fails on standing grounds, for lack of *redressability*, is puzzling. The complaint (JA64) alleged that Respondents were managing federal resources so as to cause Petitioners' land to be eroded by the sea, see, *e.g.*, *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), praying that the district court "enjoin [Respondents] from allowing the de facto takings of [Petitioners'] property to continue," and enjoin "any action" inconsistent with the statutory exemption from condemnation (JA73). The requested injunction, based on the Takings Clause and potentially requiring Respondents to take immediate action against beach erosion, would *directly* redress the injury.

b. Contrary to Respondents' submission, and despite certain broad language in some of its opinions, this Court has not confined district court jurisdiction to takings challenges to statutes involving the "direct transfer of funds," Opp. 18 n.7 (citing *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion of O'Connor, J.)), nor made congressional intent to *withdraw* Court of Federal Claims jurisdiction the touchstone for the availability of equitable relief (Opp.17).

The plurality in *Eastern Enterprises* did not assume that the coal company Petitioners *could not have* filed suit for post-deprivation compensation, but rather that Congress did not *require* them to pursue that remedy. Consistent with that reasoning – and with the principle that the Takings Clause is not a "poor relation" under the Bill of Rights, *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) – the Court has repeatedly entertained suits (and affirmed injunctive relief) in a range of cases, by no means confined to "money-transfer" statutes,

alleging that post-deprivation compensation would be inadequate or unjust, *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978); that the appropriation was not for a "public use," see *Lingle v. Chevron USA Inc.*, 125 S. Ct. 2074, 2084 (2005) ("No amount of compensation can authorize such action"); or that it was not duly authorized, see Pet. 29-30 & n.18. See also *Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997). The common denominator of these decisions was not the character of the governmental action challenged (*e.g.*, "fund-transfer" statutes), but rather the nature of the *plaintiffs' claims*: *i.e.*, whether they were of a type for which Congress intended to make the Tucker Act remedy *exclusive*.

As explained in the petition (pp. 27-29), the claim in this case falls squarely within the principle established by these precedents. In creating the Fire Island National Seashore, Congress gave property owners explicit statutory protection against having their land taken by the government, even with compensation. See 16 U.S.C. 459e-1(e) (providing that DOI "shall not" acquire of privately owned, improved property "without the consent of the owners").[5] That provision plainly establishes that taking of this property is *not* authorized and reflects a legislative determination that post-appropriation monetary relief under the Tucker Act (even if available) would be per se "unjust" compensation for these property interests.[6]

---

[5] Contrary to the Government's contention (Opp. 19), the complaint *did* rely upon the statutory bar on unconsented acquisition of private property, albeit misciting the U.S. Code section in which it appears. See JA73 (requesting order prohibiting "the DOI from taking any action which would condemn improved properties which are exempt from condemnation pursuant to 16 U.S.C. Section 455-e-7(a)) [sic]").

[6] There are also reasons to question the adequacy of any Tucker Act remedy. Any claim for compensation might well face a defense under the Flood Control Act, 33 U.S.C. 702c, which the United States has cited as a bar to actions by property owners seeking relief for shore erosion. See *Devito v. U.S.*, 12 F. Supp. 2d 269, 273 (E.D.N.Y. 1998); *United States v. James*,

c. Seeking to avoid the settled principle (see Pet. 29-30) that challenges to takings effected *without authorization* are not relegated to the Court of Federal Claims, Respondents urge that the word "acquire" in Section 459e-1(e) be read as a limitation only on formal exercises of the eminent domain power. But it is implausible to assume that Congress intended to enact a regime in which private landowners (many of whose charitable contributions of land had made the creation of the National Seashore possible) would enjoy extraordinary, categorical protection against *formal* eminent domain proceedings, but would be relegated to post-destruction damages for other governmental actions that would take their property without consent. If Congress had intended to enact such an odd regime, the term "acquire" (see Opp. 18-19), would have been a most inapt means for distinguishing between "de facto" and other takings. By engaging in actions inconsistent with a private owner's rights, the government may "inversely" condemn, and thereby "acquire," the property.[7] Indeed, this Court has long used the term just that way: "When the property was flooded the United States acquired the land and it became part of the river." *United States v. Dickinson,* 331 U.S. 745, 751 (1947).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted.

---

478 U.S. 597, 605 (1986).

[7] In inverse condemnation litigation, the United States commonly secures a formal transfer of title. See, *e.g.*, *Drakes Bay Land Co. v. United States*, 459 F.2d 504 (Ct.Cl. 1972) (inverse condemnation judgment entered on condition that land owner tender a deed to the government); Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 147 (1996) ("In condemnation cases, the government always wins a judgment giving it title (or at least possession), and in inverse condemnation cases, the government already has possession of the property – and needn't give it back").

Irving Like
REILLY, LIKE, & TENETY
179 East Neck Road
Babylon, N.Y. 11704
(631) 669-3000

Sean H. Donahue
2000 L. Street, Suite 808
Washington, DC 20036
(202) 466-2234

Leon Friedman,
148 East 78th Street
New York, NY 10021
(212) 737-0400

David T. Goldberg
Counsel of Record
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Lawrence R. Liebesman
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-3000

Counsel for Petitioners

AUGUST 2005